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No. 88-1716

In The Supreme Court of the United States

October Term, 1988

SANFORD J. BERGER,

Petitioner,

v.

THE SUPREME COURT OF OHIO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a canon of judicial conduct that permits a candidate for judicial office to conduct a truthful, vigorous and upright campaign, provided he makes no pledges or promises concerning the disposition of issues he may ultimately be called upon to decide, violate that candidate's rights under the First Amendment or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

2. Is a plaintiff who has judgment entered against him entitled to a full evidentiary hearing in order to determine whether he is a prevailing party pursuant to 42 U.S.C. § 1988?

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The relevant judgment of the court below was rendered on October 31, 1988.

STATEMENT OF THE CASE

In 1984, Petitioner ("Petitioner" or "Berger") was a candidate for the office of Judge of the Cuyahoga County, Ohio, Court of Common Pleas, Division of Domestic Relations. As part of his campaign, Petitioner wished to publicly criticize the administration of the domestic relations court. It was Petitioner's perception, however, that such comments were prohibited by Canon 7(B)(1)(c) of the Ohio

Code of Judicial Conduct ("7(B)(1)(c)").[1] Petitioner maintained this misperception concerning the coverage of 7(B)(1)(c) despite the absence of any indication that Respondent Supreme Court of Ohio or its individual justices interpreted 7(B)(1)(c) in a fashion that would put Petitioner at risk for making any of the statements contemplated.

Despite the absence of any threat of prosecution, Petitioner initiated suit in the United States District Court for the Southern District of Ohio, Eastern Division, seeking assurances from the district court that he could speak his mind without reprisal. The district court, reviewing this case initially on Petitioner's motion for preliminary injunction and again on Respondents' motion for summary judgment, entered judgment for Respondents, holding that Petitioner's fears were unfounded and that there was no evidence that the Supreme Court of Ohio either interpreted 7(B)(1)(c) in an overly expansive and illegal manner or sought to enforce it in any way, legal or otherwise, against Petitioner for his announced course of conduct.

The United States Court of Appeals for the Sixth Circuit, in an unpublished per curiam opinion, affirmed the judgment of the district court on October 31, 1988. Subsequent to the Sixth Circuit's judgment, Petitioner filed a petition for rehearing en banc, which was denied on January 24, 1989. Petitioner's petition for writ of certiorari was docketed with this Court on April 8, 1989.

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[1] 1 Canon 7(B)(1)(c) states:

(1) A candidate, including an incumbent judge, for a judicial office:

* * *

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

ARGUMENT

I. PETITIONER CANNOT SATISFY THE REQUIREMENTS FOR PLENARY REVIEW.

A. The Petition For Writ Of Certiorari Is Untimely

On page 8 of Berger's petition for writ of certiorari, he acknowledges that subsequent to the Sixth Circuit's judgment in this case, he "filed a Petition for Rehearing En Banc. . . ." *See also* cover page and first page of text of Plaintiff-Appellant Sanford Berger's Petition for Rehearing *En Banc* Containing Suggestions for Rehearing *En Banc*. (A-1-2). Pursuant to Rule 20.2 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 2801(c), Berger had ninety days from October 31, 1988, the date of the Sixth Circuit's judgment, in which to file his petition for writ of certiorari. Ninety days from October 31, 1988, was January 29, 1989. Consequently, unless Berger can identify a tolling provision in this Court's rules, his petition was filed too late and cannot be received by the Clerk.

The only tolling provision in this Court's rules is found in Rule 20.4, which provides, that

> [t]he time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a *petition for rehearing* is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

(Emphasis added.) Thus, Berger could suspend the deadline for filing his petition for writ of certiorari only by filing with

the Sixth Circuit a petition for rehearing. He did *not* do so. Rather, he filed a petition for rehearing *en banc*, which does not satisfy the requirement for Rule 20.4. Berger's petition for writ of certiorari, therefore, is "jurisdictionally out of time" and must not be accepted by the Clerk. Rule 20.3.

B. This Case is Moot.

Berger was a candidate for judicial office in 1984. At the time, there was no attempt whatsoever to discipline him under Cannon 7(B)(1)(c). Moreover, the decisions of the lower courts make it clear that the type of criticism of Ohio's courts that Berger intended to lodge was not prohibited by the Code of Judicial Conduct. Finally, Berger has taken no action to indicate that he plans to run again for judicial office.[2] Any decision rendered by this Court, therefore, would be purely advisory in nature. Thus, the fact that this case is moot makes plenary review inappropriate.

C. The Sixth Circuit's Decision Is Not In Conflict With Any Decisions Issued By Other Circuits Or This Court.

Petitioner has not identified a single court of appeals other than the Sixth Circuit that has addressed the issue of the disciplining of judicial candidates, nor has Petitioner pointed to any decision of the Court that addresses the narrow question presented herein. Consequently, there is no reason for the Court to utilize this case as a vehicle for ensuring jurisprudential uniformity or fairness.

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[2] Berger's inaction in respect to again seeking office demonstrates that there is no "reasonable expectation that . . . [he] would be subjected to the same [state] action again." *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886, 1890 n. 2 (1988). (Citations omitted.) Consequently, the doctrine of "capable of repetition, yet evading review," is inapplicable to this case. Of course, the fact that the Supreme Court of Ohio never has interpreted Canon 7(B)(1)(c) in a manner that poses any threat to Berger or similarly situated persons renders it even less likely that a controversy will arise in the future between the parties.

Not only is this case of little importance to the nation as a whole, but its impact in the Sixth Circuit will be limited because it was an *unpublished* per curiam opinion. As a result, it will enjoy limited notoriety and application even within that circuit. *See* Rule 24(B) of the Rules of the United States Court of Appeals for the Sixth Circuit ("citation of unpublished decisions . . . is disfavored"). Thus, exercise of this court's plenary review is clearly unwarranted.

D. Neither Petitioner Nor Any Other Candidate For Judicial Office Ever Has Been Disciplined By The Supreme Court of Ohio For Violating Canon 7(B)(1)(c).

Petitioner has not pointed to a single instance in which he or any other candidate for judicial office in Ohio has been disciplined for remarks made during the course of an election campaign. There is absolutely no evidence that the Supreme Court of Ohio would apply Canon 7(B)(1)(c) in an unconstitutional fashion. Petitioner's unfounded speculations alone should not provide sufficient justification for the exercise of this court's jurisdiction.

II. THE SIXTH CIRCUIT'S JUDGMENT UPHOLDING THE LEGALITY OF CANON 7(B)(1)(C) IS CORRECT.

The Court has noted that if the construction of a statute

> is fairly possible by which [a serious doubt of constitutionality] may be avoided, . . . a court should adopt that construction. In particular, this court has been willing to assume . . . [legislative] solicitude for fair procedure, absent explicit statutory language to the contrary.

Califano v. Yamasaki, 442 U.S. 682, 693 (1979). (Citations omitted.) Thus, state legislation carries a strong presumption of constitutionality. *See, e.g., McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969). In particular, legislation "which has not been authoritatively

construed by a state court should be construed in a manner which will avoid . . . constitutional questions." *Dale Baker Oldsmobile, Inc. v. Fiat Motors of North America, Inc.*, 794 F.2d 213, 221 (6th Cir. 1986) (citing *New York v. Ferber*, 458 U.S. 747 (1982)).

First, it is important to note what behavior is *not* prohibited by Canon 7(B)(1)(c). It does not prevent a candidate for judicial office from announcing his views on administrative or procedural reform of the courts. *See Matter of Riley*, 691 P.2d 695 (Ariz. 1984); *In re Inquiry Relating to Baker*, 218 Kan. 209, 542 P.2d 701 (1975). It does not prevent honest criticism of opponents, *id.*, and it does not inhibit a candidate's ability to conduct an effective campaign for office. These were the very activities in which Petitioner intended to engage.

On the other hand, a candidate for judge may not make promises or pledges as to how he will decide certain cases or promise more favorable treatment to certain citizens at the expense of their fellows. Such promises or pledges are not made in connection with a judge's faithful and impartial performance in office. Indeed, they are so antithetical to the concept of justice that the state has a compelling interest in prohibiting their publication. *See Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). It makes no difference that the candidate making such promises is sincere about keeping them. It is the very pledge itself, regardless of whether it is true or not, that is anathema to a free society.

Finally, it goes without saying that

> judges are frequently called to adjudicate cases squarely presenting social and political issues, and the state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest or person is entitled to the greatest respect.

Berger v. The Supreme Court of Ohio, et al., Case No. C-2-84-1227, slip op. at 4 (S.D. Ohio Aug. 3, 1987) (citing *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 306 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).[3] Because Canon 7(B)(1)(c) permits every judicial candidate to run "a truthful, upright and vigorous campaign," *Berger v. The Supreme Court of Ohio, et al.*, Case No. 87-3935, slip op. at 4 (6th Cir. Oct. 31, 1988), precisely the sort of campaign Petitioner ran, it is not unconstitutional on its face nor was it applied in an unconstitutional fashion in this case.

III. PETITIONER, WHO HAD JUDGMENT ENTERED AGAINST HIM, IS NOT ENTITLED TO A FULL EVIDENTIARY HEARING TO DETERMINE WHETHER HE IS A PREVAILING PARTY FOR PURPOSES OF AN AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988.

42 U.S.C. § 1988 provides, in relevant part, that a "prevailing party" in an action predicated on 42 U.S.C. § 1983 may recover "a reasonable attorney's fee as part of the [court] costs." A "prevailing party" is one who "receive[s] at least some relief on the merits of his claim. . . ." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). "[A] favorable judicial statement of law in the course of litigation that *results in judgment against the plaintiff* does not suffice to render him a prevailing party." *Id.* at 763. (Emphasis added.) In the case at bar, the lower courts granted judgment for Respondents, *not* Petitioner. Petitioner received no damages, no injunctive relief, and no declaratory judgment in his favor. There was no settlement on terms favorable to Petitioner. Respondents did not in any way alter their conduct in respect to Petitioner. *See id.* at 761. At best, Petitioner received "a favorable statement of law in an otherwise unfavorable opinion." *Id.*

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[3] The different role and responsibilities of judges as opposed to legislators clearly justifies Ohio's different treatment of judicial candidates and therefore eliminates any notion that Petitioner's right to equal protection was violated.

at 762. It defies common sense to suggest that under the circumstances, Petitioner is a prevailing party for purposes of an award of attorney's fees under § 1988.

To require a district court to conduct an evidentiary hearing on the question of attorney's fees even after entering judgment against the plaintiff in a § 1983 action would undermine the concept of judicial economy and elevate disputes concerning fee awards at the expense of disputes on the merits. *See Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983) ("request for attorney's fees should not result in a second major litigation"). Moreover, any plaintiff could force a district court to conduct an evidentiary hearing on attorney's fees, even after the court enters judgment for the defendants, simply by exaggerating the scope of legislation and then arguing that the more limiting application given to it by enforcement officials is a direct result of his lawsuit. Because the courts below correctly decided that Petitioner was not a prevailing party and that he was not entitled to an evidentiary hearing on that issue, there is no reason for the Court to grant certiorari in this case.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 15, 1989

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 87-3935

SANFORD J. BERGER
Plaintiff-Appellant

- vs -

THE SUPREME COURT OF OHIO, ET AL.
Defendants-Appellees

PLAINTIFF-APPELLANT SANFORD BERGER'S PETITION FOR REHEARING *EN BANC* CONTAINING SUGGESTIONS FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SANFORD J. BERGER	:	CASE NO. 87-3935
	:	
Plaintiff-Appellant	:	PLAINTIFF-APPELLANT
	:	SANFORD J. BERGER'S
- vs -	:	PETITION FOR REHEARING
	:	EN BANC CONTAINING
THE SUPREME COURT	:	SUGGESTIONS FOR
OF OHIO, ET AL.	:	REHEARING EN BANC
	:	
Defendants-Appellees	:	

Plaintiff-Appellant, Sanford J. Berger, respectfully petitions this Court for a rehearing *en banc* of the panel's October 31, 1988 decision (a copy of which is appended hereto) which affirmed the trial court's judgment.

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the United States Supreme Court cases of *New York Times v. Sullivan*, 379 U.S. 254 (1964); *Brown v. Hartlage*, 456 U.S. 45 (1982) and *Boos v. Barry*, _____ U.S. _____ , 108 S.Ct. 1157 (1988), and that to consideration by the full Court is necessary to secure and maintain conformity therewith.

* * *